

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

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U.S. DISTRICT COURT  
SAN JUAN, P.R.

EDNA GARCIA COLON and  
JOSE AMALBERT FIGUEROA

Plaintiffs,

v.

CIVIL NO. 98-1478 (RLA)

KMART CORPORATION & INSURANCE  
CORPORATION ABC,

Defendants.

MINUTES AND ORDER OF INITIAL SCHEDULING CONFERENCE  
HELD ON SEPTEMBER 1, 1999

The parties appeared before the undersigned in chambers for an Initial Scheduling Conference on September 1, 1999 from 3:45 p.m. to 4:45 p.m. Attorneys JOSE A. LEON LANDRAU and NOEMI LANDRAU RIVERA appeared on behalf of plaintiffs. EDUARDO VERA, ESQ., and CARLOS A. GONZALEZ SOLER, ESQ., represented defendant, KMART CORPORATION.

**Excess Insurance Carrier**

The Court queried counsel regarding the unidentified insurance carrier included in the complaint. KMART counsel indicated it was self-insured up to \$2 Million, but that its excess carrier is NATIONAL UNION FIRE INSURANCE COMPANY OF PENNSYLVANIA (NATIONAL UNION), as indicated in its Answer to the Third Amended Complaint.

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1 Accordingly, the Third Amended Complaint is hereby deemed  
2 AMENDED to include NATIONAL UNION FIRE INSURANCE COMPANY OF  
3 PENNSYLVANIA as a defendant.

4  
5 IT IS FURTHER ORDERED that in the event plaintiffs wish to  
6 pursue a direct action against NATIONAL UNION, they shall effect  
7 service of process upon the excess insurer and file the executed  
8 summons returned no later than September 27, 1999.

9  
10 **Additional File Copy**

11 The Court reminded KMART counsel of their duty to provide an  
12 additional file copy to the Clerk of the Court upon filing of the  
13 original. In addition, counsel for both parties were admonished once  
14 again that failure to comply would result in the imposition of  
15 sanctions. (See Margin Order issued on April 6, 1999, docket No. 20).

16  
17 **Liability**

18 The Court engaged the parties in a lengthy discussion on the  
19 facts and the liability aspects of this action.

20  
21 Plaintiffs allege that MRS. EDNA GARCIA COLON fell because she  
22 was struck by a row of shopping carts being pushed into the store by  
23 a KMART employee. Defendant denies that MRS. GARCIA COLON was ever  
24 hit by the carts and argues instead that she merely fell.

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1 Plaintiffs stated that they intended to present testimony of a  
2 safety engineer, Eng. CARLOS COSTAS (or a substitute engineer from  
3 VECTOR Corporation), regarding the allegedly defective design of the  
4 KMART Caguas Centro store. It is plaintiffs' contention that this  
5 store is poorly designed because the shopping carts being returned to  
6 the store from the parking area have to be pushed through an entrance  
7 way which is adjacent to the entrance doors that are used by the  
8 patrons of the store. Further, the situation becomes even more  
9 potentially dangerous because the carts, in order to be accommodated  
10 in their designated holding area, have to be pushed across the  
11 customers' path as they enter the store.

14 Plaintiff's proffer as to the engineer's testimony is that this  
15 expert will demonstrate that the design of this particular KMART  
16 store made it more probable than not that the accident occurred in  
17 the manner that plaintiffs are alleging. Defendant objected, arguing  
18 that this testimony was not relevant to the core issue of whether  
19 MRS. GARCIA COLON was or was not hit by the carts being pushed by a  
20 KMART employee.  
21

23 The Court, having further considered the arguments of both sides  
24 on this matter hereby FINDS that the proffered testimony is relevant  
25  
26

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1 to the issue of whether MRS. GARCIA COLON was or was not impacted by  
2 the carts being pushed by the KMART employee.

3 Accordingly, plaintiffs' expert engineer's testimony shall be  
4 permitted at trial, providing it complies with the procedural and  
5 substantive requirements of Rule 26 Fed. R. Civ. P.  
6

7 **Disclosure re: Plaintiffs' Orthopedic Surgeon**

8 IT IS HEREBY ORDERED that on or before September 7, 1999, the  
9 parties shall show cause if they have any objections to the Court's  
10 participation in this action given the undersigned's doctor-patient  
11 relationship with DR. ORLANDO FERNANDEZ, plaintiffs' medical expert.  
12

13 **Claims of Deceased Plaintiff's Heirs**

14 Defendant requested time to file a motion to dismiss as time-  
15 barred the claims of MIGDALIA, GLADYS and NORMA AMALBERT GARCIA  
16 related to the death of their mother, EDNA GARCIA COLON.  
17

18 The Court, having reviewed the record as well the claims  
19 described in the Third Amended Complaint hereby FINDS as follows:

20 Plaintiff JOSE AMALBERT FIGUEROA can claim for his own pain and  
21 suffering due to the damages allegedly suffered by his wife, EDNA  
22 GARCIA COLON, now deceased, as a result of the fall that took place  
23 at the KMART store in Caguas. AMALBERT FIGUEROA can also claim for  
24  
25  
26

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1 his own pain and suffering caused by the death of his wife, deceased  
2 plaintiff EDNA GARCIA COLON.

3         Substitute plaintiffs MIGDALIA, GLADYS and NORMA AMALBERT GARCIA  
4 can only claim the damages that their mother, deceased plaintiff EDNA  
5 GARCIA COLON could have claimed for herself had she lived. That is,  
6 GARCIA COLON's own physical injuries, pain and suffering and moral  
7 damages resulting from her fall. Plaintiffs cannot claim their own  
8 personal damages for the DEATH of their mother since these actions  
9 are time-barred.  
10  
11

12                 **Defendant's Jurisdictional/Abstention Arguments**

13         Counsel for defendant manifested KMART's intention to file  
14 dispositive motions requesting the Court's abstention in this case --  
15 and others in which KMART is a defendant -- alleging that (1) it is  
16 being prejudiced rather than "protected" by the federal court's  
17 diversity provisions due to its status as a "foreign", out-of state  
18 defendant; and (2) it is also being prejudiced by the higher monetary  
19 awards dispensed by civil juries in the Puerto Rico vis `a vis those  
20 awarded in the local courts.  
21  
22

23         Although at the conference the Court acquiesced to the briefing  
24 of these issues, upon further review and consideration, the Court  
25 finds these arguments without merit. Diversity jurisdiction in this  
26

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1 case is plainly within the purview of 28 U.S.C. § 1332. Further, the  
2 right to jury trials in diversity cases in Puerto Rico has been  
3 upheld by the First Circuit Court of Appeals. See Vera Lozano v.  
4 Intl. Broadcasting., 50 F.3d 67 (1st Cir. 1995).  
5

6 Accordingly, unless defendant sets forth a good faith argument  
7 not propounded in Vera Lozano, no briefing on this issue will be  
8 allowed.  
9

#### 10 Discovery Schedule

11 The Court admonished counsel for both sides that the discovery  
12 schedule submitted as part of their Joint Initial Scheduling  
13 Conference Memorandum was noncompliant with its Order, as it did not  
14 provide fixed dates for proposed discovery deadlines. Counsel were  
15 further admonished that the Court intends to schedule trial in this  
16 action sometime in late February/March, 2000.  
17

18 Accordingly, the parties shall meet on **Thursday, September 9,**  
19 **1999, at 1:00 p.m.** at the offices of RAMIREZ LAVANDERO, LANDRON &  
20 VERA to delineate a date-specific discovery timetable integrating a  
21 proposed February/March trial date.  
22

23 IT IS FURTHER ORDERED that **no later than September 13, 1999**, the  
24 parties shall file a Joint Amended Discovery Schedule for the Court's  
25 approval.  
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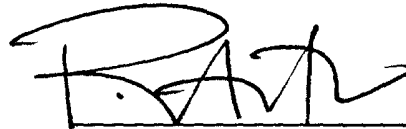
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**FAILURE TO COMPLY**

Counsel are admonished that the failure to comply with the terms of this Order or to meet in good faith for the discovery schedule's preparation are sanctionable under Fed. R Civ. P. 16(f) and may result in the imposition of sanctions upon the party and/or counsel personally, including but not limited to the payment of reasonable expenses and/or the striking of claims, defenses or witnesses.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 2<sup>nd</sup> day of September, 1999.



RAYMOND L. ACOSTA

United States District Judge